

petition

OF

ROBERT RANDAL, ESQ.

Ordered, by the House of Assembly, to be printed,
January 1828.

Petition

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To The Honourable The Commons House of Assembly of Upper Canada, in Provincial Parliament Assembled.

THE PETITION

Of Robert Randal, of Stamford in the County of Lincoln, Esquire,

Humbly Sheweth:—

That in the year of our Lord, one thousand eight hundred and sixteen or thereabouts, your petitioner employed the present Mr. Justice Boulton, then Attorney General, as his legal adviser, in all his affairs relative to the disputed property between the petitioner and Messrs. Clark and Street. That Mr. Justice Boulton continued such his legal adviser and attorney until his election to the bench, when he handed over the petitioner's business and papers to his son, the present Solicitor General. That upon Mr. Justice Boulton's so giving up the business of the petitioner to Henry John Boulton, Esq., the latter required of the petitioner a collateral security for the sum of fifty pounds, then due to his father, for his professional services, as also for fifty pounds, which were to accrue to himself. That your petitioner accordingly gave the said Henry John Boulton, a mortgage on lot No. eleven in the first concession on the Rideau, in the township of Nepesin, in the district of Johnstown, containing two hundred acres, for one thousand eight hundred and nineteen—and on the seventh day of July, in the year of our Lord, one thousand eight hundred and nineteen, your petitioner executed and delivered to the said Henry John Boulton, a bond in a penalty of two hundred pounds, with a condition reciting the said mortgage, and to pay to the said Henry John Boulton the sum of one hundred pounds, as mentioned in the said mortgage. That the above described lot is a most valuable one.—your petitioner having many years ago been offered two pounds an acre for it, and another lot in the said township having been subsequently sold at sheriff's sale, at Mr. Boulton's suit, for ready money, for four hundred and fifty pounds, or thereabouts, as your petitioner has been informed and believes.

That subsequently, and after the execution and delivery of the bond and mortgage, the said Henry John Boulton proceeded in the business of your petitioner, and obtained against one Elijah Phelps a writ for a large sum—which having been set aside, and a new trial granted, the cause again came on for trial, at the Niagara Assizes for the year one thousand eight hundred and eighteen, where Mr. Justice Boulton presided, and where your petitioner attended with a great number of witnesses to go to trial. That the said Henry John Boulton also attended as counsel for your petitioner, but who refused in the first instance going on with the trial, until the petitioner had given him his note for twenty-five pounds, payable on the first day of May A. D. 1819—but which note was not given without a strong remonstrance from your petitioner, as he considered he had already given him ample funds of security. That after giving the said note, Henry John Boulton promised to go on with the cause immediately; when your petitioner went in search of his witnesses; but on his return was not a little astonished to find, that the cause had been ordered to lie over to the next assizes,—in consequence of the Judge declining from motives of delicacy to try it. That your petitioner strongly remonstrated against such a decision, both with his counsel, and his father the Judge, who admitted to the petitioner that before he accepted the circuit in which Niagara is, he knew this trial would come on,—and had determined not to try it, as he had formerly been concerned in it. That the said Henry John Boulton must have been aware that this cause would not be tried; but had allowed your petitioner to go to a considerable expense in gathering his witnesses; had obtained his note for twenty-five pounds, and then abandoned him, and has never since done any business for him.

That afterwards, and immediately after the said note became due, your petitioner was sued thereon, and upon the aforesaid bond by the said Henry John Boulton,—he having got out his writ directed to the sheriff of Niagara, on the twenty-first day of May A. D. 1819.—and the note being his due on the first day of that month.—That on the twenty-fourth day of June A. D. 1819, your petitioner was served at his residence at Stamford in the Niagara District, with the declaration and summons, at the suit of the said Henry John Boulton, returnable on the first of Trinity Term then next; and from that day, until about eighteen months afterwards, and never until he was accidentally informed whilst attending his duty in parliament in the winter of 1821, of the sale of his lands at the suit of the said Henry John Boulton, did he hear verbally or by letter of its progress. That immediately after he was so served with the declaration and summons, your petitioner wrote to the said Henry John Boulton upon the sub-

“payment of money, a rule Nisi, to refer the Bond to the master for Taxation, shall not be necessary, “but a notice of motion for the peremptory rule shall be given in writing to the defendant, or his “Attorney, at least thirty days before Hilary and Easter terms, and twenty one days before Trinity “and Michaelmas terms respectively.” which rule shall accordingly be made absolute in the first in- “stance on affidavit of such notice.” That notwithstanding this rule was in full force at the time of signing the judgment against the Petitioner, he never received, nor did the said Henry John Boulton ever give the above required notice to your Petitioner, or to any Attorney for him.

Your petitioner further represents, that as the said condition of the said Bond recited the said Mortgage, and professing therefore to be only a Collateral security, your Petitioner was entitled to the benefit of an Act of the Legislature of the mother Country and in force in this Province, requiring in behalf of such defendants, that the Plaintiff shall set forth on record, the condition of such Bond, assign breaches thereof, and assess damages before a jury, and your Petitioner is informed that according to law no execution can in such case issue till such assessment has taken place. But in the suit against your Petitioner, the condition of the Bond is wholly suppressed and does not appear on the record.

Your Petitioner found in the course of the applications made by him to the Court of King's Bench for relief, that the following rule was insisted upon as a vindication of the judgment secretly obtained as aforesaid.

Michaelmas Term, Scott C. J. }
Thorp J. }

It is ordered, that from and after the first day of Hilary Term next, in all cases where the Defendant has not appeared either in person or by his attorney, judgment for default shall not be signed, without an affidavit first made and filed of a demand of Plea having been served upon the defendant personally or by being left at his usual place of abode, if the same be in the district where the action is brought, and if the defendant's place of abode be not in such district, that then the demand of Plea shall be entered in the office, accompanied by an affidavit stating that the defendant's place of abode within such district is not known to the Defendant, and that Judgment by default in such case shall not be signed till four days after such service or entry respectively.—By the Court

(Signed) JOHN SMALL,
Clark of the Crown.

Under this rule, persons are required to take an oath that must do violence to the conscience of the Defendant, inasmuch as it implies a belief that the defendant's place of residence is in such District, not known to the Defendant.

Your petitioner also felt deeply aggrieved at the operation of the said Rule, not only because it arbitrarily deprived your petitioner of a service of the laws of this Province, but also because it violated judgment in 4 instead of 8 days, in defiance of the laws of this Province, but also because it violated the common principles of justice, by requiring notice to be served upon the residents of the Home District, while it favoured the Attorneys of this Town, by exempting them from the trouble of giving such notices to those defendants, who from their remote residence from the Crown Office in the outer districts, particularly needs the aid of the said Court to enforce, rather than to supersede, the just enactment of the Provincial Legislature, for their protection.

That on being informed, as before mentioned, of the sale of your petitioner's lands, at the suit of the said Henry John Boulton (and which was the first intimation he ever had of the progress of the said suit,) your petitioner immediately caused the proceedings to be looked into, and finding the above gross irregularities in the proceedings, he caused an application as soon as Counsel could be heard, to be made to the Court of King's Bench for relief, in setting aside the judgment and execution which had been so manifestly obtained against every rule and order of the said Court; but after argument, the Court decided it came too late.

That your petitioner subsequently caused another application to be made on the same and other

to try it, as he had formerly been concerned in it. That the said Henry John Boulton must have been aware that this cause would not be tried; but had allowed your petitioner to go to a considerable expense in gathering his witnesses; had obtained his note for twenty five pounds, and then abandoned him, and has never since done any business for him.

That afterwards, and immediately after the said note became due, your petitioner was sued thereon, and upon the distressful bond by the said Henry John Boulton, he having got his writ directed to the sheriff of Niagara, in the twenty first day of May A. D. 1819; and the note being only due on the first day of that month. That on the twenty-fourth day of June A. D. 1819, your petitioner was served at his residence at Stamford in the Niagara District, with the declaration and summons, at the suit of the said Henry John Boulton, returnable on the first of Trinity Term, next; and from that day, until about eighteen months afterwards, and never until he was accidentally informed whilst attending his duty in parliament in the winter of 1821, of the sale of his lands at the suit of the said Henry John Boulton, did he hear verbally or by letter of its progress. That immediately after he was served with the declaration and summons, your petitioner wrote to the said Henry John Boulton upon the subject, requesting to be informed of the progress of the said suit, but receiving no answer, he imagined the same was dropped.

That on looking into the proceedings in the said suit, he finds the following to be the statement. The summons issued the thirty first day of May, and was returnable on the first day of Trinity Term 1819. That on the third day of July following, on the affidavit of service of same, on this deposition, the declaration and summons were filed in the crown office, and on the same day an appearance entered in the same office by the said Henry John Boulton for your petitioner. That on the same day an affidavit was filed in the said office made by a clerk of the said Henry John Boulton, that the place of residence of your petitioner in the Home District was unknown to the person who made the affidavit. That on the same day a demand of plea was put up or filed in the said office, and accompanied with the said affidavit. That on the nineteenth day of June, four days afterwards, interlocutory and final judgment was signed against your petitioner, and execution issued against the personal effects of your petitioner, to the sheriff of the Home District for the amount of the Bond, Notes and Costs. That in his declaration against your petitioner, the said Henry John Boulton declared, in debt on the Bond and Note together, signed judgment on the same together, and issued execution against your petitioner for the same.

That the execution against your petitioner's chattels (directed to the sheriff of a district in which it was notorious to the Plaintiff, as well as to every other person who knew him, that he did not reside), was returnable on the first of Michaelmas Term in the same year, and was filed on the return day with the sheriff's return of "no Goods", and on the same day, execution was issued against the lands of your petitioner, directed to the sheriff of the Johnstown District and returnable last of Michaelmas Term A. D. 1820, upon which your petitioner is informed a most valuable lot situated in the Township of Newpaw, in the District of Balmston, on the River Ottawa, and enjoying most important water privileges, and not the one mortgaged, has been sold to satisfy the said execution.

That by the tenth section of the Act of the 34th of George the Third, regulating the practice of the Court of King's Bench, and under which Act the process in the said cause was issued, it is expressly enacted "that in all actions or suits where the Defendant or Defendants reside without the limits of the Home District, or District where the Court shall be holden, eight days shall be allowed after such demand of Plea, as the ordinary time within which they shall be required to file their plea." &c. but that notwithstanding the said Act, the said Henry John Boulton, who perfectly knew the residence of your petitioner to be within the District of Niagara and not in the Home District, not only from having served him with the writ there, but also, from the letter which your petitioner wrote to him after the Action was commenced, proceeded to sign not only interlocutory but final judgment within four days after demand of Plea and that put up or filed in a district where he well knew your petitioner did not reside.

That your petitioner is informed by Professional Gentlemen, that in no instance upon judgment by default, on a promissory Note, can execution be issued until the Note has either been to a jury to assess the damages, or been sent by rule of Court, to the proper Officer to compute the principal and interest, but that notwithstanding this rule of law, execution after judgment by default was at once issued on the promissory Note so given by your petitioner to the said Henry John Boulton. That by a general rule of the Court of King's Bench in the 40th year of the late King, it is expressly "ordered, that in future, the Note or Bond is to be produced for the inspection of the Judges, when a motion is made to refer them to the master" but that the said Henry John Boulton, not only did not produce either the Note or Bond to the Judges, but did not even move the Court to have them referred to the master.

That by another general rule of the said Court made in the same year, it is expressly "ordered that from and after the end of this (Michaelmas) term, the Clerk give no writ of Execution on a default, without an order of the Court in term time, or fiat of a Judge in vacation." That notwithstanding this rule, then in full force, the said Henry John Boulton proceeded to sue out execution against your petitioner on a judgment by default without either an order from the Court or fiat from the Judge.

That by another Rule of the said Court made in Hilary Term, in the 47th year of the same King, it is also expressly "ordered, that in all cases of Judgment by default, on Bonds conditioned for the

judgment in 4 instead of 8 days, in defiance of the laws of this Province, but also because it violated the common principles of justice, by requiring notice to be served upon the residents of the Home District, while it favoured the Attorneys of this Town, by exempting them from the trouble of giving such notices to those defendants, who from their remoter residence from the Crown Office in the outer districts, particularly needful rule of the said Court to enforce, rather than to supersede, the just enactment of the Provincial Legislature, for their protection.

That on being informed, as before mentioned, of the sale of your petitioner's lands, at the suit of the said Henry John Boulton (and which was the first intimation he ever had of the progress of the said suit.) your petitioner immediately caused the proceedings to be looked into, and finding the above gross irregularities in the proceedings, he caused an application as soon as Counsel could be heard, to be made to the Court of King's Bench for relief, in setting aside the judgment and execution which had been so manifestly obtained against every rule and order of the said Court; but after argument, the Court decided it came too late.

That your petitioner subsequently caused another application to be made on the same and other grounds to set aside this judgment, conceiving that it had not been fully argued, but it was again decided against him, on the grounds of the former decision, altho' the court expressed a strong wish to interfere, if it could consistently with its rules.

Your petitioner also humbly states that on the second application made for relief: against this judgment, the judges of the said court upheld the same on the ground that the matter had been before heard and determined by them, and that according to an ancient rule of court in the reign, as your petitioner believes, of one of the James's, no matter heard by counsel on both sides and on which the opinion of the court had been given could be re-opened, and that the counsel attempting it was liable to be silenced for one year, and should be again troubled a second time in like manner, they would desire to see the penalty inflicted, and your petitioner cannot but feel and express the oppression which he suffers from this unjust adherence to one rule of court for the purpose of upholding against your petitioner a judgment which had been obtained by the violation of three other rules of court equally solemn and binding, and even in violation of several legislative enactments in this province and in England, the due and honourable observance of which by the said Henry John Boulton would have been an ample protection for your petitioner against the ruin and injustice brought upon him.

That in the year 1824 immediately after the last decision, as a last resort to get rid of this extraordinary judgment, your petitioner was advised to bring a writ of error contra nobis to reverse this said judgment, that being in the opinion of his counsel, his only chance; but the difficulty lay in procuring the writ, as it is an original one which issues out of Chancery, and there being no court of that description in this Province. This difficulty was however at last surmounted, the writ obtained under the great seal of the Province, Error assigned and pleaded to, and the matters argued in the variation of Trinity Term A. D. 1825, before two of the judges, Mr. Justice Boulton being absent in England, and judgment was to be given in the following Term.

That on applying for judgment, so far as your petitioner could judge, the Judges seemed divided in their opinions, and that therefore your petitioner would have received nothing by a division of opinion--but without giving judgment, the decision was, that the matter must stand over till the Bench was full.

That this was in your petitioner tantamount to a decision against him, inasmuch as Mr. Justice Boulton had, on a former occasion, as before stated, refused to try a cause in which he had been interested for your petitioner, and could not now of course be expected to give an opinion either way, as the greater part of the money recovered by this very judgment had been received by him.

That strange as it may seem, the Sheriff of the Johnstown District instead of selling the Lot, so mortgaged by your petitioner to the said Henry John Boulton, and thus as it were foreclosing the same, sold another and still more valuable Lot belonging to your petitioner, and the same was purchased, as your petitioner has been informed, by Levis P. Sherwood, Esquire, who has since been elevated to the Bench.

That your petitioner, under these circumstances, would not feel it proper, and has been advised not to apply to the Court for their judgment, which your petitioner thinks under the very peculiar circumstances of the case could not be had, for the same reason that the Honourable Mr. Justice Boulton once refused to try a case for him.

Your petitioner humbly represents, that after submitting to many losses and afflictions which would break the heart of almost any man, he found that the most valuable remnant of his property had been cruelly sacrificed, under this irregular and nefarious judgment, and unless relieved by the interposition of your Honourable House, he shall have to number himself amongst those who have fallen victims to injustice and oppression in this province.

That there being no higher court in this Province, to which your petitioner can now resort, he has thus petitioned your honourable house to interfere and grant him such relief as to your honourable body may appear just.

And as in duty bound will ever pray.

ROBERT RANDAL.

York, January, 19th 1828.